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# THE INSANITY DEFENSE UNDER SIEGE: LEGISLATIVE ASSAULTS AND LEGAL REJOINDERS†

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No aspect of our legal system has engendered a more intense level of debate than the role of the insanity defense in the criminal justice process. The hundreds of articles published in the weeks following the *Hinckley*<sup>1</sup> verdict illustrate the degree of public concern about the manner in which the defense is employed. The intensity of this concern has obscured some fundamental realities about the operation of the insanity defense mechanism. The defense actually plays a valuable role in the current judicial system, and it is seldom abused. To prove this point, this Article will examine how the defense is used, its true role in the entire scheme of jurisprudence, and—most importantly—what really happens after the insanity defense is pleaded.

## I. THE LAW IN NEW JERSEY

The insanity defense lies at the cutting edge between the criminal law and mental health systems, and becomes the focal point of public scrutiny whenever there is an event which seems to indicate that the two systems are out-of-sync. Underlying the defense is the central ethical question in the entire criminal justice system: how does our society assign responsibility for an individual's anti-social acts? This question, which has plagued the system for centuries, is a profoundly important one which goes to our basic moral concepts of guilt and innocence.

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† A portion of this Article is adopted from testimony delivered on August 5, 1982, to the New Jersey State Senate Judiciary Committee by Commissioner Rodriguez. Following the receipt of that testimony, the Senate Committee rejected all efforts to abolish the insanity defense or to modify it. That testimony is excerpted at 110 N.J.L.J. 453 (1982). Brief sections of this Article also appeared in Perlin, *Whose Plea Is It Anyway? Insanity Defense Myths and Realities*, 79 PHILADELPHIA MED. 5 (1983).

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1. *United States v. Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981), *opinion clarified, reconsideration denied*, 529 F. Supp. 520 (D.D.C.), *aff'd*, 672 F.2d 115 (D.C. Cir. 1982).

Despite a rising tide of criticism, New Jersey has chosen to retain the insanity defense. In 1975 and again in 1982 this issue was debated at great length before the State Legislature as one aspect of an overall criminal code law reform effort.<sup>2</sup> The Legislature listened to days of testimony and debate and studied parallel law reform efforts in other jurisdictions, such as New York and Michigan, before rejecting a proposal to abolish the insanity defense.<sup>3</sup> The legislators found, first, that the insanity defense is rarely used and second, that defendants who successfully plead insanity are confined for longer periods than defendants found to be sane and thereafter convicted of the same crime.<sup>4</sup> Satisfied that the defense is not a source of abuse, the New Jersey legislators concluded that it plays a necessary part in a just law enforcement system.

In a parallel development, the New Jersey Supreme Court was one of the nation's first judicial bodies to articulate procedures to accompany findings of "not guilty by reason of insanity" (NGRI). *State v. Krol*,<sup>5</sup> *State v. Fields*,<sup>6</sup> and *State v. Carter*,<sup>7</sup> are comprehensive analyses of the requirements and consequences of the NGRI defense. *Krol* established the minimal constitutional requirements that must be met before a defendant found NGRI may be committed. Commitment must be keyed to a finding that the person is dangerous to himself or society, not merely to the finding of insanity.<sup>8</sup> The supreme court pointed out:

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2. Ironically, the United States Congress has undertaken similar deliberations. In 1975 and 1976, the United States Senate spent months debating a massive criminal law reform omnibus bill which included a provision abolishing the insanity defense. See S.1, 94th Cong., 1st Sess. (1975). For a full analysis of the relevant portions of the bill, see Wales, *An Analysis of the Proposal to "Abolish" the Insanity Defense in S.1: Squeezing a Lemon*, 124 U. PA. L. REV. 687 (1976). That provision died in committee after extensive scrutiny and consideration. See 34 CONG. Q. 586 (Mar. 13, 1976); 33 CONG. Q. 2385 (Nov. 8, 1975).

3. New Jersey's consideration of abolition of the insanity defense is discussed in Cohen, *The New Jersey Insanity Defense: Present and Proposed*, 2 CRIM. JUST. Q. 38 (1974) [hereinafter cited as *The New Jersey Insanity Defense*]; and Cohen, *In Defense of the Insane: A Proposal to Abolish the Defense of Insanity*, 2 CRIM. JUST. Q. 127 (1974) [hereinafter cited as *In Defense of the Insane*].

4. See *infra* notes 29-47 and accompanying text.

5. 68 N.J. 236, 344 A.2d 289 (1975).

6. 77 N.J. 282, 390 A.2d 574 (1978).

7. 64 N.J. 382, 316 A.2d 449 (1974).

8. 68 N.J. at 259-61, 344 A.2d at 301-02. The court stated:

The standard is "dangerous to self or society." Dangerous conduct is not identical with criminal conduct. Dangerous conduct involves not merely violation of social norms enforced by criminal sanctions, but significant physical or psychological injury to persons or substantial destruction of property. Persons are not to be indefinitely incarcerated because they present a risk of future conduct which is merely socially undesirable. Personal liberty and autonomy are of too great value to be sacrificed to protect society against the possibility of future behavior which some may find odd, disagreeable,

The object of the order is to impose that degree of restraint upon defendant necessary to reduce the risk of danger which he poses to an acceptable level. Doubts must be resolved in favor of protecting the public, but the court should not, by its order, infringe upon defendant's liberty or autonomy any more than appears reasonably necessary to accomplish this goal.<sup>9</sup>

In *State v. Fields* the court ruled that NGRI acquittees have a right to periodic review of their commitments,<sup>10</sup> stressing the care with which trial courts should treat such cases:

If at any periodic review proceeding the State is unable to meet its burden of justifying the continuance of the currently prevailing restraints upon the liberty of the committee, it becomes the task of the reviewing judge again to "mold" an appropriate order. . . . The new order should provide for the least restrictive restraints which are found by the judge to be consistent with the well-being of the community and the individual. . . . However, even where the committee's condition shows marked improvement, only the most extraordinary

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or offensive, or even against the possibility of future non-dangerous acts which would be ground for criminal prosecution if actually committed. Unlike inanimate objects, people cannot be suppressed simply because they may become public nuisances . . . .

Commitment requires that there be a substantial risk of dangerous conduct within the reasonably foreseeable future. Evaluation of the magnitude of the risk involves consideration both of the likelihood of dangerous conduct and the seriousness of the harm which may ensue if such conduct takes place . . . . It is not sufficient that the State establish a possibility that defendant might commit some dangerous acts at some time in the indefinite future. The risk of danger, a product of the likelihood of such conduct and the degree of harm which may ensue, must be substantial within the reasonably foreseeable future. On the other hand, certainty of prediction is not required and cannot reasonably be expected.

A defendant may be dangerous in only certain types of situations or in connection with relationships with certain individuals. An evaluation of dangerousness in such cases must take into account the likelihood that defendant will be exposed to such situations or come into contact with such individuals. . . .

Determination of dangerousness involves prediction of defendant's future conduct rather than mere characterization of his past conduct. Nonetheless, defendant's past conduct is important evidence as to his probable future conduct. It is appropriate for the court to give substantial weight to the nature and seriousness of the crime committed by defendant and its relationship to his present mental condition.

*Id.* (footnotes omitted).

9. *Id.* at 261-62, 344 A.2d at 303.

10. 77 N.J. at 293, 390 A.2d at 579.

11. *Id.* at 302-03, 390 A.2d at 584.

case would justify modification in any manner other than by a gradual de-escalation of the restraints upon the committee's liberty.<sup>11</sup>

The court in *Fields* believed that a process of gradually reducing restraint would permit more thorough observation of the committee's ability to cope with normal life.<sup>12</sup> It would increase the probability that an erroneous determination of nondangerousness would be detected before the committee is returned to an uncontrolled environment and preserve the "State's compelling interest in maintaining the safety and security of its citizens."<sup>13</sup>

*Carter* established the standards governing conditional release of criminal committees. Release is permitted only if the likelihood of dangerous behavior has been reduced at least to the point at which future "psychotic episodes" can be predicted and forestalled.<sup>14</sup> To facilitate speedy recall of the patient should problems arise jeopardizing his safety or that of the public, the trial court is required to maintain frequent contact with the patient and supervising psychiatrist throughout the period of conditional release.<sup>15</sup>

Cases such as *Krol*, *Fields* and *Carter* have created a coherent and practical framework to insure that patients do not "slip through the cracks" at the interface of the criminal justice and mental health systems. As will be discussed later, New Jersey's record under *Krol* and *Fields* is an excellent one: it is a system that can and does work.<sup>16</sup>

The success of the New Jersey approach has been noted by leading experts in the field. Recently, the former President of the American Academy of Psychiatry and Law, testifying at a hearing on parallel federal legislative proposals, noted the sophistication of the New Jersey insanity disposition system<sup>17</sup> and urged Congress to adopt a similar apparatus for federal jurisdictions.

The New Jersey experience is especially significant at the present time, when so much of the debate on all sides is based on untested assumptions, predictions, and competing social theories. New Jersey, through the auspices of the Department of the Public Advocate, has brought to the legislative battleground what few others in the country have been able to amass:<sup>18</sup> hard data based on seven years of experience with *Krol* hearings and four years of experience with *Fields* hearings. These statistics reveal the extent to which this issue has been distorted in the public eye.

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12. *Id.* at 303, 390 A.2d at 584.

13. *Id.*

14. 64 N.J. at 400, 316 A.2d at 459.

15. *Id.* at 408, 316 A.2d at 463.

16. See *infra* notes 41-47 and accompanying text.

17. *Hearings on S. 818, S. 1106, S. 1558, S. 2669, S. 2672, S. 2678, S. 2745, and S. 2780 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 460, 462 (1982) (statement of Robert L. Sadoff, M.D.).

18. See, e.g., Pasewark, Pantle & Steadman, *The Insanity Plea in New York State, 1965-1976*, 51 N.Y. St. B.J. 186 (1979).

It has frequently been suggested that the insanity defense is improperly overused,<sup>19</sup> an ancient allegation which resurfaced some seven years ago in former President Nixon's unsupported charges that the defense has been subject to "unconscionable abuse by defendants."<sup>20</sup> All empirical analyses, however, have been consistent: the public,<sup>21</sup> legal profession,<sup>22</sup> and—specifically—legislators,<sup>23</sup> "dramatically"<sup>24</sup> and "grossly"<sup>25</sup> overestimate both the frequency and the success rate of the insanity plea. This error undoubtedly is abetted by the media's "bizarre depictions,"<sup>26</sup> "distortion[s],"<sup>27</sup> and "inaccu[racies],"<sup>28</sup> in presenting information on mentally ill persons charged with crime. Of the more than 32,500 adult cases handled by the Office of the Public Defender in New Jersey in fiscal year 1982, NGRI pleas were *entered* only in fifty cases, less than one-sixth of one percent of all cases.<sup>29</sup> Of those fifty cases, the plea was *successful* only in fifteen cases.<sup>30</sup> That figure represents 30% of all cases in which it was raised, and, most importantly, about one-twentieth of one percent of all cases handled in the course of a year. To suggest that such a percentage bespeaks "overuse" strains the imagination.<sup>31</sup>

Furthermore, the decision to raise the insanity defense is not without risks. A comparison of available figures demonstrates quite vividly that defendants who asserted an insanity defense at trial, and who were ultimately found guilty of their charges, served significantly longer sentences than defendants

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19. See, e.g., M. KAVANAGH, *THE CRIMINAL AND HIS ALLIES* 90 (1928) (charging that, because "skillful criminal lawyers" can turn insanity defense trials into "emotional disputes, . . . in cases where insanity is presented as a defense, so many verdicts which outrage justice are returned").

20. MacKenzie, *New Code Would Alter Rules on Insanity*, Wash. Post, Oct. 12, 1975, at C6, col. 1.

21. Pasewark, Pantle & Steadman, *supra* note 18, at 186.

22. Pasewark & Craig, *Insanity Plea: Defense Attorneys' Views*, 8 J. PSYCHIATRY & L. 413, 415, 436-40 (1980).

23. Pasewark & Pantle, *Insanity Plea: Legislators' View*, 136 AM. J. PSYCHOLOGY 222, 222-23 (1979) (in response to a survey, one state's legislators estimated that 4,400 defendants pleaded insanity and that 1,800 were found NGRI in a sample time period; in reality, 102 defendants asserted the defense and only one was successful).

24. Pasewark, Pantle & Steadman, *supra* note 18, at 186.

25. Pasewark & Pantle, *supra* note 23, at 223.

26. Steadman & Cocozza, *Selective Reporting and the Public's Misconceptions of the Criminally Insane*, 41 PUB. OPINION Q. 523, 532 (1977-1978). See, e.g., Kaufman, *The Insanity Plea on Trial*, N.Y. Times, Aug. 8, 1982, § 6 (Magazine), at 16.

27. Steadman & Cocozza, *supra* note 26, at 523.

28. *Id.* at 532.

29. See Appendix, Table IV, Col. 1 (excluding cases open pending competence).

30. See *id.*, Table IV.

31. These figures are consistent with a 1978 national study which found that, out of more than 2 million criminal prosecutions, only 1,625 involved the successful use of the insanity plea (less than one-tenth of one percent). Lauter, *Why the Insanity Defense is Breaking Down*, NAT'L L.J., May 3, 1982, at 1, 11.

tried on the same charges without asserting the insanity defense.<sup>32</sup>

Another common misconception is that the insanity defense is raised only in murder cases.<sup>33</sup> In reality, only four of the fifteen NGRI findings last year (26.6%) stemmed from cases involving a death.<sup>34</sup> Moreover, examination of all the files ever opened by the Division of Mental Health Advocacy on persons committed following NGRI findings—a total of 141 in more than eight years (less than 1.8% of all Division of Mental Health Advocacy cases)<sup>35</sup>—revealed that in less than one-third of all cases (46 of 141) involved deaths.<sup>36</sup> Interestingly, among these 141 cases were cases involving charges of nonviolent offenses such as writing false checks, carrying an unloaded starter's pistol, and drug use.<sup>37</sup> In any event, the reality does not comport with the myth.

It is also assumed that persons found NGRI are released from custody or court restraint after having served little or no time, an assumption disproved by the facts. All persons found NGRI are subject to judicial oversight

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32.	Total Mean Sentences: No Insanity Defense Pleaded	Total Mean Sentences: Insanity Defense Pleaded; Guilty Verdict
Prison Sentences For:		
Serious offenses against persons	165.5 months	372 months
Atrocious assault	55 months	120 months
Robbery	70 months	204 months
Crimes against property	40 months	35 months

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NEW JERSEY CORRECTIONAL MASTER PLAN POLICY COUNCIL, 2 NEW JERSEY CORRECTIONAL PLAN 33 (1977) [hereinafter cited as N.J. CORRECTIONAL PLAN]. When the comparison is limited to murder cases, the results are equally striking. A randomly selected sample of 39 homicide cases showed a mean maximum sentence of 21.6 years for defendants who did not plead NGRI; defendants who pleaded NGRI and were ultimately convicted received mean maximum sentences of 42.4 years—practically double the sentence imposed on the former class of murder defendants.

33. See, e.g., *State v. Lucas*, 30 N.J. 37, 87, 152 A.2d 50, 77 (1959) (Weintraub, C.J., concurring).

Persons charged with murder are no more successful in securing an acquittal by reason of insanity than are persons charged with other crimes. STEADMAN, KEITNER, BRAFF & ARIVANTES, *FACTORS ASSOCIATED WITH A SUCCESSFUL INSANITY PLEA*, 4-5 (1981).

34. See Appendix, Table V.

35. As of January 1, 1982, the Division of Mental Health Advocacy had opened 26,550 cases.

36. Appendix, Table I. Cases involving deaths include not only murders but also manslaughter and death by automobile. See N.J. STAT. ANN. § 2C:11-1 to -6 (West 1982).

37. Of the 141 open files, there are 46 death cases, 57 other assaults, 11 arsons, 12 thefts, and 15 others. See Appendix, Table I.

For an earlier survey, see Singer, *Insanity Acquittal in the Seventies: Observations and Empirical Analysis of One Jurisdiction*, 2 MENTAL DISABILITY L. REP. 407 n.9 (1977-1978).

prior to any release from confinement.<sup>38</sup> Persons found NGRI of violent crimes are confined to the Vroom Building (Forensic Unit) of Trenton Psychiatric Hospital<sup>39</sup> for some period of time during the pendency of their criminal charges. A person found NGRI cannot be released from this facility until a court determines that his release will pose no danger to himself or the community.<sup>40</sup>

Of the 138 *Krol* committees still living, only 22 (just 15%) have been released from all restraints.<sup>41</sup> Significantly, only one case in this group stemmed from a wrongful death.<sup>42</sup> In fact, 35% of the committees (50 of 141) are still in full custody, and 47% of them (66 of 141) are still under partial court restraints following conditional release.<sup>43</sup> Such results indicate the seriousness with which trial courts take the supreme court's admonition that "only the most extraordinary case would justify modification in any manner other than by a gradual de-escalation of the restraints upon the [patient's] liberty."<sup>44</sup>

One of the most significant effects of this commitment system for NGRI defendants is that they spend considerably more time in custody than do other criminal defendants. On the average, *Krol* defendants spent more than 40 months in such a setting;<sup>45</sup> almost double the mean of 20.5 months that

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38. See *supra* notes 10-14 and accompanying text.

39. A law was recently enacted establishing the Vroom Building as a separate facility known as the Forensic Psychiatric Hospital. N.J. STAT. ANN. § 30:1-7 (West Supp. 1983). Vroom Building is a maximum security facility in which patients are confined on locked, guarded wards. Patients seldom leave the building and, even then, are heavily guarded. Conditions at the institution have been described as not only severely restrictive of movement but also unhealthy and dangerous. The Court of Appeals for the Third Circuit described the conditions as follows:

The jury found, and the court agreed, that confining Scott in the maximum security wing of Trenton Psychiatric Hospital amounted to punishment in violation of the due process clause. There was ample evidence that Scott and the other inmates were exposed for twenty four years to subhuman living conditions, including poor plumbing with leaking pipes covering the floor with inches of water; inoperative sinks and toilets; inadequate ventilation; absence of windows or inoperative windows; inability during seven months of the year to go into the yard for fresh air; inoperative radiators resulting in indoor temperatures below 50°; summer temperatures reading 105° due to absence of ventilating equipment; for a time availability of showers only once a week; and absence of hot running water in sinks in the cells. As to many of these gross physical deficiencies the testimony was not even disputed. *Scott v. Plante*, 641 F.2d 117, 128 (3d Cir. 1981), *vacated and remanded*, 102 S. Ct. 3474 (1982).

40. N.J. STAT. ANN. § 2C:4-8(b) (West 1982).

41. See Appendix, Table I.

42. *Id.*

43. *Id.* For a description of the conditional release process, see *Fields*, 77 N.J. at 302-03, 390 A.2d at 584; *Carter*, 64 N.J. at 392-95, 316 A.2d at 455-57.

44. *Fields*, 77 N.J. at 303, 390 A.2d at 584.

45. See Appendix.



convicted criminal defendants spend in prison settings.<sup>46</sup> Moreover, since a *Krol* patient cannot be released unless he is found not to be dangerous, he may be subject to a lifetime of judicial oversight, far in excess of that experienced by a criminal offender. Again, there is a huge gap between myth and reality.<sup>47</sup>

It is also commonly assumed that many criminal defendants who plead insanity are faking and are able to persuade unwitting courts that they are mentally ill when they are not, in fact, impaired. This is hardly a new thought: in 1838, Dr. Isaac Ray, the father of American forensic psychiatry, noted that

[t]he supposed insurmountable difficulty of distinguishing between feigned and real insanity has conduced, probably more than all other causes together, to bind the legal profession to the most rigid construction and application of the common law relative to this disease, and is always put forward in objection to the more humane doctrines.<sup>48</sup>

Almost 150 years later, Dr. Ray's observations are still sadly on point; again, though, the popular perception is simply incorrect. Of the 141 *Krol* patients, 115 were diagnosed as schizophrenic (including 38 of the 46 cases involving a death), eleven as suffering from organic brain syndrome, five as mentally retarded, and three as paranoid. One patient was determined to have an alcoholic psychosis, one suffered from depressive neurosis, and one was characterized as an "anti-social personality." In only three cases out of 141 was the diagnostician unwilling to specify the nature of the patient's mental illness. Thus, in 138 cases the examining psychiatrist certified that the defendant suffered from some form of mental illness.<sup>49</sup> Again, the statistics belie the myths.<sup>50</sup>

## II. ALTERNATIVES TO THE NGRI DEFENSE

Both the New Jersey Legislature and the United States Congress recently undertook an extensive examination and debate of strikingly similar packages of bills aimed at abolishing or limiting the insanity defense, creating an alternative verdict of guilty but mentally ill, and restricting disposition procedures available to individuals found NGRI.<sup>51</sup> Yet, each of these bills was premised on all or part of the misconceptions as to the use of the insanity defense discussed in Part I of this Article.

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46. See generally N.J. CORRECTIONAL PLAN, *supra* note 32.

47. These statistics are even more revealing when it is considered that a significant percentage of convicted defendants are never incarcerated at all. The gap between *Krol*-time and prison-time is thus even greater than it appears.

48. I. RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY § 247, at 243 (1962).

49. See Appendix, Table II.

50. But see *infra* notes 152-73 and accompanying text. In considering the persuasiveness of this evidence it may be worthwhile to consider whether the ability to categorize mental illness is equivalent to the ability to predict inherent dangerousness of defendants.

51. It should be noted that few of these proposed bills are new in concept.

### A. Abolition Bills

The abolition bills introduced before the United States House of Representatives Judiciary Committee's Subcommittee on Criminal Justice closely parallel bills earlier debated before the New Jersey Senate Judiciary Committee.<sup>52</sup> Several bills propose abolition of the insanity defense during a trial on guilt or innocence; others would permit evidence of mental illness/insanity to be

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Several—including some of the abolition attempts—were enacted temporarily 50 and 60 years ago in other states; each was quickly found to be unconstitutional. *See, e.g.,* State v. Lange, 168 La. 958, 996, 123 So. 639, 642 (1929); Sinclair v. State, 161 Miss. 142, 153, 132 So. 581, 582 (1931); State v. Strasburg, 60 Wash. 106, 110 P. 1020, 1025 (1910). In recent months, abolition statutes have been enacted in Idaho and Montana. *See* IDAHO CODE § 18-207(a) (1982); 1979 Mont. Laws ch. 713. Neither statute has yet been tested in the courts.

52. Compare S. 2745, 97th Cong., 2d Sess. (1982):

§ 16(a) Mental *condition* shall not be a defense to any charge of criminal conduct.

(b) Nothing *in this section* is intended to prevent the admission of expert evidence on the *issues of mens rea or any state of mind* which is an element of the offense, subject to the rules of evidence. (emphasis added),

and H.R. 6673, 97th Cong., 2d Sess. (1982):

§ 16(a) Mental *condition* shall not be a defense to any charge of criminal conduct.

(b) Nothing *herein* is intended to prevent the admission of expert evidence on the *state of mind* which is an element of the offense, subject to the rules of evidence. (emphasis added),

with N.J. Senate Bill 1495 (1982):

1. a. Mental *disease or defect* is not a defense to any charge of criminal conduct.

b. *Expert evidence may be admitted, however, on the issues of mens rea or any state of mind which is an element of the offense, subject to the Rules of Evidence.* (emphasis added),

and N.J. Senate Bill 1587 (1982):

1. a. Mental *condition* shall not be a defense to any charge of criminal conduct.

b. Nothing *herein* is intended to prevent the admission of expert evidence on the *issues of mens rea or any state of mind* which is an element of the offense, subject to the Rules of Evidence. (emphasis added).

Compare also S. 818, 97th Cong., 1st Sess. (1982):

§ 16(a) *It shall be a defense to a prosecution under any Federal statute, that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense.* (emphasis added),

and S. 1558, 97th Cong., 1st Sess. (1982):

§ 17(b) If the issue of insanity is raised . . . , the jury shall be instructed to find, or, in the event of a *nonjury trial*, the court shall find, the defendant—

(1) guilty;

(2) not guilty; or

(3) *not guilty only by reason of insanity.*

(emphasis added),

and H.R. 6718, 97th Cong., 2d Sess. (1982):

§ 4242(c) If the issue of insanity is raised . . . , the jury shall be instructed

offered at sentencing.<sup>53</sup> All raise serious constitutional and practical questions.

The bills would deprive a criminal defendant of the opportunity to offer evidence going to the heart of his susceptibility to punishment, *i.e.*, his criminal intent. It is elementary law that conduct is punishable when a person commits a prohibited act and does so with "criminal intent" (*mens rea* or a guilty mind).<sup>54</sup> Consideration of criminal intent is based on the assumption that the person has the capacity to choose between right and wrong; that he has a sense of wrongdoing.<sup>55</sup> For these reasons, we must be extremely careful in tampering with the basic roots of the insanity defense, a major component of the Anglo-American common law for over 700 years.<sup>56</sup>

to find, or, in the event of a *nonjury trial*, the court shall find the defendant—

- (1) guilty;
- (2) not guilty; or
- (3) *guilty but insane*.

(emphasis added),

with N.J. Senate Bill 1631 (1982):

1. (New Section) a. *It shall be an affirmative defense to a criminal prosecution* that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense.

b. If the issue of mental disease or defect is raised . . . , the jury shall be instructed to find, or, in the event of a *trial without a jury*, the court shall find, the defendant *either*:

- (1) guilty;
- (2) not guilty; or
- (3) *not guilty by reason of mental disease or defect*.

(emphasis added).

And finally, compare H.R. 6921, 97th Cong., 2d Sess. (1982) (abolishing the insanity defense for specific offenses such as assassination and attempted assassination of a President) with N.J. Senate Bill 1359 (1982) (providing in part: "the affirmative defense of insanity shall not be available to a person who has been charged with the crime of murder under N.J.S. 2C:11-3 [notwithstanding any other law to the contrary]").

53. See *id.*

54. See *In Defense of the Insane*, *supra* note 3, at 130. See also *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954), in which Judge Bazelon stated "[o]ur collective conscience does not allow punishment where it cannot impose blame." (quoting *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945), *cert. denied*, 334 U.S. 852 (1948)).

55. *United States v. Brawner*, 471 F.2d 969, 985 (D.C. Cir. 1972) ("The concept of 'belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil' is a core concept that is 'universal and persistent in mature systems of law.'" (quoting *Morrisette v. United States*, 342 U.S. 246, 250 (1952)). See also Monahan, *Abolish the Insanity Defense? — Not Yet*, 26 RUTGERS L. REV. 719, 725 (1973).

56. The insanity defense has been in existence since at least the twelfth century. But what shall we say of a madman bereft of reason? And of the deranged, the delirious and the mentally retarded? or if one labouring under a high fever drowns himself or kills himself? *Quaere* whether such a one commits felony *de se*. It is submitted that he does not, nor do such persons forfeit their inheritance or their chattels, since they are without sense and reason and can no more commit an *injuria* or a felony than a brute animal since

New Jersey's experience is particularly illustrative on this point. The insanity defense has been a part of the law of the State since its first constitution incorporated English common law.<sup>57</sup> The defense has been based upon a defen-

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they are not far removed from brutes, as is evident in the case of a minor, for if he should kill another while under age he would not suffer judgment. [That a madman is not liable is true, unless he acts under pretence of madness while enjoying lucid intervals.]

2 H. BRACTON, *DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE* 424 (S. Thorne Trans. 1968).

[B]ecause a crime is not committed unless the intention to injure exists, [it is will and purpose which mark *maleficia*, nor is a theft committed unless there is an intent to steal,] as may be said of a child or a madman, since the absence of intention protects the one and the unkindness of fate excuses the other.

*Id.* at 384.

Before Bracton, the sources of the insanity defense at common law can be traced at least to the Roman legal authorities that influenced Bracton. *See generally* T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 261-62 (5th ed. 1956). For example, in the Digests (or Pandects) of Justinian first published in A.D. 533, the following commentary on the insanity defense appears in an imperial "rescript" issued by the brother emperors Marcus Aurelius (A.D. 120-180) and Commodus (A.D. 161-192) during the period of their joint reign (A.D. 177-180):

If it is positively ascertained by you that Aelius Perscus is to such a degree insane that, through his constant alienation of mind, he is void of all understanding, and no suspicion exists that he was pretending insanity when he killed his mother, you can disregard the manner of his punishment, since he has already been sufficiently punished by his insanity; still, he should be placed under careful restraint, and, if you think proper, even be placed in chains; as this has reference not so much to his punishment as to his own protection and the safety of his neighbors. If, however, as often happens, he has intervals of sounder mind, you must diligently inquire whether he did not commit the crime during one of these periods, so that no indulgence should be given to his affliction; and, if you find that this is the case, notify Us, that We may determine whether he should be punished in proportion to the enormity of his offence, if he committed it at a time when he seemed to know what he was doing.

2 THE CIVIL LAW 259 (S. Scott ed. 1973). For another translation, see A. BIRLEY, *MARCUS AURELIUS* 272-73 (1966).

The maxim derived from this Roman commentary—*furiosus solo furore punitur* (a madman is punished by his madness alone)—appears in numerous English cases and treatises on the insanity defense. *See, e.g.,* H. BROOM, *A SELECTION OF LEGAL MAXIMS* 5 (London 1845); E. COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, OR A COMMENTARY UPON LITTLETON* 247b (17th ed. 1817).

The development of the insanity defense between the eras of Bracton and Blackstone, *infra* note 58, is well documented. *See* E. COKE, *supra*; 1 M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 29-37 (London 1736); W. HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 1-3 (London 1739). For an extensive history of this development, see J. BIGGS, *THE GUILTY MIND* 47-56, 81-88 (1955).

Note further Professor Monahan's comment that abolition of the insanity defense would "cut loose the criminal law from its moorings of condemnation for moral failure." Monahan, *supra* note 55, at 731 (quoting Livermore & Meehl, *The Virtues of M'Naghten*, 51 MINN. L. REV. 789, 797 (1967)).

57. *See* *State v. Mairs*, 1 N.J.L. 385 (Sup. Ct. 1795). *See also* N.J. CONST.

dant's capacity to distinguish right from wrong,<sup>58</sup> rather than upon an absence of *mens rea*.<sup>59</sup> The historical, common law principle was codified in a still-extant statute which provides:

A person is not criminally responsible for conduct if at the time of such conduct he was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong. Insanity is an affirmative defense which must be proved by a preponderance of the evidence.<sup>60</sup>

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art. 22 (1776), *modified*, N.J. CONST. art. 1, § 7 (1844); N.J. CONST. art. 1, § 9. The common law at the time was described by Blackstone:

Now there are three cases, in which the will does not join with the act: 1. Where there is a defect of understanding. For where there is no discernment, there is no choice; and where there is no choice, there can be no act of the will, which is nothing else but a determination of one's choice, to do or to abstain from a particular action: he therefore, that has no understanding, can have no will to guide his conduct.

4 W. BLACKSTONE, COMMENTARIES \* 21.

58. In the first reported case in New Jersey involving the defense of insanity, the court recognized the common law principles involved and instructed the jury as follows:

[I]f it is your opinion that at the time of committing the act he was unconscious that he ought not to do it, or in other words, incapable of distinguishing right from wrong, *in a moral point of view*, then you have nothing further to do, but to render a verdict of acquittal on the score of insanity.

State v. Spencer, 21 N.J.L. 196, 201 (1846) (opinion of Hornblower, C.J.) (emphasis in original).

59. It is well to begin with the law's concept of criminal responsibility. The common law spoke of the bad and of the sick. The premise was that a hostile act may in one case spring from wickedness and in another from some infirmity of the mind which the individual did not author. It was the moral judgment of the common law that a forbidden act should not be punished criminally unless done with *mens rea*, a sense of wrongdoing. The *M'Naghten* test of legal insanity followed hard upon that conception of crime. If at the time of committing the act, the accused was laboring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong, he was legally insane. . . . Thus afflicted, the accused did not have the evil mind required by the common law's concept of criminal accountability. The act was therefore chargeable to illness.

State v. Maik, 60 N.J. 203, 212, 287 A.2d 715, 720 (1972) (citations omitted).

Thus, it was natural, although analytically incorrect, for writers and judges developing such defenses as infancy, insanity or compulsion, to rationalize them on the absence of *mens rea*, rather than, more appropriately, upon mental incapacity for voluntary action. In other words, it was not that the defendant's mind was not evil, but rather that he had no mind that was free to will.

State v. Savoie, 67 N.J. 439, 456, 341 A.2d 598, 608 (1975) (citations omitted).

60. N.J. STAT. ANN. § 2C:4-1 (West 1982).

Although the United State Supreme Court "has never articulated a general constitutional doctrine of *mens rea*,"<sup>61</sup> it has stated that the "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."<sup>62</sup> As the court pointed out in *Morrisette v. United States*,<sup>63</sup> the use of the phrase "'*mens rea*' to signify an evil purpose or mental culpability . . . [seeks] to protect those who were not *blameworthy in mind* from conviction of infamous common law crimes."<sup>64</sup>

To have such "evil purpose" or "criminal intent," an act must be done "knowingly," a term defined as "voluntarily and purposely,"<sup>65</sup> or "voluntarily and intentionally."<sup>66</sup> In addition to guilty knowledge, *mens rea* implies willfulness;<sup>67</sup> willfulness means "a voluntary intentional violation of a known legal duty."<sup>68</sup> Although "knowingly" and "willfully" are different elements of *mens rea*, each must be proved to sustain a criminal prosecution.<sup>69</sup>

Insofar as the abolition bills would limit a defendant's ability to prove that he was incapable of appreciating the wrongfulness of his act and its consequences,<sup>70</sup> they would thereby deprive the defendant of his due process rights guaranteed by the Federal Constitution.<sup>71</sup> Thus, a defendant cannot be deprived of all ability to offer evidence on the issue of his criminal intent.<sup>72</sup>

61. *Powell v. Texas*, 392 U.S. 514, 535 (1968).

62. *Dennis v. United States*, 341 U.S. 494, 500 (1951). *See also* *American Communications Ass'n v. Douds*, in which the Court noted:

While it is true that state of mind is ordinarily relevant only when it is incidental to, and determines the quality of, some overt act, . . . the fact must not be overlooked that mental state in such cases is a distinct issue, . . . of which the "overt act" may or may not be any proof. For example, the physical facts surrounding a death by shooting may be as consistent with a finding of accident as of murder. Wilfulness, malice and premeditation must therefore be proved by evidence wholly apart from the act of shooting.

339 U.S. 382, 411 n.21 (1950) (citations omitted).

63. 342 U.S. 246 (1952).

64. *Id.* at 252 (emphasis added).

65. *United States v. Byrd*, 352 F.2d 570, 572 n.1 (2d Cir. 1965). *See also* *United States v. Crimmins*, 123 F.2d 271, 272 (2d Cir. 1941).

66. *United States v. Jewell*, 532 F.2d 697, 699 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976); *Sewell v. United States*, 406 F.2d 1289, 1294 n.3 (8th Cir. 1969).

67. *United States v. Greenbaum*, 138 F.2d 437, 438 (3d Cir. 1943).

68. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

69. *United States v. Mekjian*, 505 F.2d 1320, 1324 (5th Cir. 1975). *See also* *Record Revolution No. 6 v. City of Parma*, 492 F. Supp. 1157, 1175 n.10 (N.D. Ohio), *rev'd on other grounds*, 638 F.2d 916 (6th Cir. 1980).

70. One commentator described the results of enacting similar legislation as follows: "Accidental (non-negligent) criminal conduct and the delusional mistake of fact will continue to excuse whereas the offender who accurately perceives what he is doing but is powerless to exercise moral judgment will suffer conviction, imprisonment and involuntary medical treatment." Wales, *supra* note 2, at 698.

71. U.S. CONST. amends. VI, XIV. *See also* N.J. CONST. art. 1, § 9.

72. *See supra* note 51.

The government may alter the procedure by which the issue of insanity is presented, but it may not eliminate the issue altogether.<sup>73</sup>

The ramifications of the enactment of abolition bills are uncertain. Such laws are not likely to withstand constitutional scrutiny. However, even assuming that action is not immediately forthcoming from the judicial branch, courts may take other steps to preserve the concept of criminal intent, causing results not intended by the legislative branch. For example, evidence of mental illness is considered generally relevant to the issue of *mens rea*.<sup>74</sup> Courts would be obliged to determine the relevance of evidence offered. The insanity defense could be retained as a rule of evidence rather than as a rule of substantive law, and be used to determine at what point evidence of mental illness as it pertains to a defendant's *mens rea* becomes relevant.<sup>75</sup>

Few defendants fit within the standard imposed by the current insanity defense. The New Jersey Supreme Court has jealously protected against an expansion of the defense beyond those not able to exercise free will in a situation.<sup>76</sup> For those who fit within the standard, the defense forms an important component of our criminal justice system. As Chief Judge Hornblower stated in the first reported case involving the defense in New Jersey:

God and humanity forbid it should ever be, that courts should frown upon insanity as a defence, or that if a jury are satisfied beyond a reasonable doubt, that the act complained of was committed when the accused was insane, they should for one moment hesitate in pronouncing a verdict of acquittal.<sup>77</sup>

#### B. "Guilty But Mentally Ill" Bills

Both the New Jersey Legislature and the United States Congress enter-

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73. *Ingles v. People*, 92 Colo. 512, 518, 22 P.2d 1109, 1111 (1933).

74. *Monahan*, *supra* note 55, at 727.

75. *Id.* at 728. Courts could use the expansion of relevance to avoid the constitutional problems raised by the proposals. See *Wales*, *supra* note 2, at 709.

76. In *State v. Sikora*, 44 N.J. 453, 210 A.2d 193 (1965), for example, the defendant sought to assert the insanity defense on the grounds of psychodynamics, *i.e.*, a psychiatric theory that all conduct is a result of one's life history. In rejecting the argument Justice Francis noted:

For protection of society the law accepts the thesis that all men are invested with free will and capable of choosing between right and wrong. In the present state of scientific knowledge that thesis cannot be put aside in the administration of the criminal law. Criminal blameworthiness cannot be judged on a basis that negates free will and excuses the offense, wholly or partially, on opinion evidence that the offender's psychological processes or mechanisms were such that even though he knew right from wrong he was predetermined to act the way he did at that time because of unconscious influences set in motion by the emotional stresses then confronting him.

*Id.* at 470, 210 A.2d at 202.

77. *State v. Spencer*, 21 N.J.L. 196, 206 (1846) (opinion of Hornblower, C.J.).

tained bills which proposed the creation of an alternative verdict of "guilty but mentally ill" (GBMI)<sup>78</sup> or "guilty but insane" (GBI)<sup>79</sup> in cases in which a defendant asserts the insanity defense. These bills appear to propose such alternative verdicts in lieu of, rather than in addition to, the verdict of "not guilty by reason of insanity" (NGRI). Presumably, this device is intended to allow the factfinder — whether judge or jury — to avoid a finding of NGRI and arrive at a verdict which imposes culpability while simultaneously acknowledging the existence of mental disease or defect.

There are several major problems with these bills. The GBMI verdict<sup>80</sup> is not only superfluous, it is dangerous as well. GBMI is indistinguishable from the traditional guilty verdict which is based on a finding that the accused is criminally responsible for his actions. If the prosecutor has proven every element of the offense beyond a reasonable doubt, the defendant is guilty. In a case where insanity is pleaded, the only inquiry remaining for the factfinder at this point is whether that guilt is negated by the defendant's evidence of insanity. If that question is answered affirmatively, the verdict is "not guilty by reason of insanity" (NGRI). If it is answered in the negative, the verdict remains "guilty."

The factfinder's addition of "but mentally ill" or "but insane" onto its initial guilty verdict does not constitute a legitimate factfinding function. This is especially true in as much as, under the proposed legislation, the consequences flowing from a GBMI verdict relate strictly to disposition and *not* to the threshold question of criminal responsibility.

One group of bills provides that a defendant found GBMI shall be given any sentence which can be imposed upon conviction of the particular offense, with the proviso that "treatment" shall be made available to him.<sup>81</sup> Another group provides for the imposition of a "provisional sentence" to be served either immediately, if no hospitalization due to mental illness is required, or following such hospitalization.<sup>82</sup> A sub-group of this latter set provide

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78. See, e.g., N. J. Assembly Bill 290 (1982); and federal bills: S. 2672, H.R. 6947, H.R. 6887, H.R. 6717, H.R. 6702, H.R. 6673, and H.R. 6653, 97th Cong., 2d Sess. (1982).

79. See, e.g., S. 1106, 97th Cong., 1st Sess. (1982); H.R. 6949, H.R. 6742, H.R. 6726, H.R. 6718, H.R. 6716, H.R. 6709, and H.R. 5395, 97th Cong., 2d Sess. (1982).

80. For purposes of discussion in this section, these bills will be referred to, collectively, as GBMI, rather than GBI, proposals; the latter will be deemed included in the former. It should be pointed out, however, that the "guilty but *insane*" alternative verdict is even more fraught with confusion and inconsistency than GBMI. In fact, under current standards of culpability and *mens rea*, the GBI verdict is a legal impossibility because insanity—so long as it continues to exist as a defense to criminal conduct—is an absolute exception to culpability, and hence to guilt. In other words, the two legal statuses denoted by those terms are mutually exclusive.

81. See N.J. Assembly Bill 290 (1982); S. 2672, H.R. 6887, H.R. 6717, and H.R. 6702, 97th Cong., 2d Sess. (1982).

82. See H.R. 6949, H.R. 6716, and H.R. 6709, 97th Cong., 2d Sess. (1982).



specifically for a pre-confinement hearing to determine whether the defendant is presently suffering from mental disease or defect.<sup>83</sup>

The first group of GBMI bills, which includes the New Jersey bill, replicate current pre-sentence and sentencing procedures in both the New Jersey and federal court systems. For example, New Jersey court rules<sup>84</sup> set forth an elaborate and comprehensive pre-sentence procedure which is paralleled in state statutory law.<sup>85</sup> New Jersey already requires a pre-sentence investigation and report to the court. The report "shall contain all presentence material having any bearing whatever on the sentence"<sup>86</sup> and "may include a report on [the defendant's] physical and *mental condition* and any other matters that the probation officer deems relevant or the court directs to be included."<sup>87</sup> After completion of the pre-sentence investigation, the court "may order that the defendant's physical or mental condition be examined, provided that the defendant is not institutionalized for the purpose of the examination."<sup>88</sup>

New Jersey court rules also require that, at sentencing, the judge state his reasons for imposing the sentence.<sup>89</sup> The statement must be specific enough to demonstrate how the judge weighed all the relevant factors, including gravity of the offense, deterrence, *rehabilitation of the defendant* and "other particularly pertinent considerations."<sup>90</sup>

The federal rules of criminal procedure provide for pre-sentence proceedings similar in scope and purpose to those in New Jersey.<sup>91</sup> A pre-sentence investigation and report is mandatory unless it is waived by the defendant, or the court "finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion . . . ."<sup>92</sup> The report must contain

such information about [the defendant's] characteristics, his financial condition and *the circumstances affecting his behavior as may be*

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83. See S. 1106, 97th Cong., 1st Sess. (1982); H.R. 6742, H.R. 6726, and H.R. 5395, 97th Cong., 2d Sess. (1982).

84. See N.J. CT. R. 3:21-2.

85. See N.J. STAT. ANN. § 2C:44-b (West 1982).

86. N.J. CT. R. 3:21-2(a).

87. N.J. STAT. ANN. § 2C:44-6b (West 1982) (emphasis added).

88. N.J. CT. R. 3:21-2(b). Furthermore, defendants convicted of one of the sexual offenses enumerated in N.J. STAT. ANN. § 2C:47-1 (West 1982) shall "be referred to the Adult Diagnostic and Treatment Center for such period as shall be necessary to complete a physical and psychological examination." N.J. STAT. ANN. § 2C:47-1 (West 1982). If the examination reveals the defendant's conduct to be "characterized by a pattern of repetitive, compulsive behavior," the court may sentence the defendant to the Center "for a program of specialized treatment for his mental condition." *Id.* § 2C:47-3. Upon commitment of a defendant to the Center, "[t]he Commissioner of the Department of Corrections . . . shall provide for his treatment in the . . . Center." *Id.* § 2C:47-4.

89. See N.J. CT. R. 3:21-4(e).

90. S. PRESSLER, CURRENT N.J. COURT RULES, 3:21-4 comment 6.

91. See FED. R. CRIM. P. 32(c).

92. FED. R. CRIM. P. 32(c)(1).

*helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant*, and such other information as may be required by the court.<sup>93</sup>

In short, existing pre-sentence procedures under the New Jersey and federal court rules are designed to accomplish the very purpose intended by the GBMI bills, namely the identification of those defendants for whom some form of psychiatric or psychological therapy is indicated based on their past history and current condition.<sup>94</sup>

The "provisional sentence" group of GBMI bills also relate solely to disposition, an area which, as noted earlier, does not constitute a legitimate factfinding function. The additional procedural aspects of the "provisional sentence" bills do not cure the basic defect of these bills — that is, the unwarranted creation of a completely superfluous and meaningless verdict which, in its ramifications, goes far beyond the legitimate factual inquiry into innocence or guilt.

Furthermore, these GBMI bills would inevitably cause significant jury confusion, as juries would be required to receive additional instructions — and undertake further deliberations — to distinguish insanity and mental disease or defect not amounting to legal insanity yet sufficient to warrant a GBMI finding.

In New Jersey, for example,<sup>95</sup> when a defendant pleads insanity, the jury is instructed that the defendant is presumed sane and that he bears the burden of proving his insanity by a preponderance of the evidence.<sup>96</sup> Under a GBMI statute, the jury would be further instructed concerning the GBMI verdict which, they would be told, requires them to find defendant guilty and mentally ill or retarded, but not legally insane — all beyond a reasonable doubt. The jury is already faced with weighing two different *quantums* of proof: the defendant's "preponderance of the evidence" standard versus the state's "beyond a reasonable doubt" standard. Requiring the jury to distinguish

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93. FED. R. CRIM. P. 32(c)(2) (emphasis added).

94. A GBMI verdict relates to a defendant's mental condition at the time of the offense, not at the time of sentencing. Thus, existing pre-sentence procedures are *superior* to the GBMI verdict in view of the objective to be accomplished—proper disposition of the defendant with regard to his current mental status. Similarly, the "but mentally ill" tag is particularly meaningless in terms of a defendant's condition at the time of disposition.

95. N.J. Assembly Bill 290 was defeated in the New Jersey Senate Judiciary Committee on August 5, 1982. Consequently, the following textual discussion of the impact of the GBMI concept on New Jersey criminal procedure is hypothetical. The authors believe, however, that the discussion is illustrative of the particular type of jury confusion which *could* be wrought, were a GBMI bill to be enacted into law in New Jersey.

96. *State v. DiPaglia*, 64 N.J. 288, 293, 315 A.2d 385, 388 (1974). See also N.J. STAT. ANN. § 2C:4-1 (West 1982).

between mental illness (or retardation)<sup>97</sup> and insanity,<sup>98</sup> increases the potential for jury confusion.

To further muddy the waters New Jersey law provides that evidence of a defendant's mental disease or defect "is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense."<sup>99</sup> In other words, evidence of mental disease or defect may negate the *mens rea* element of some offenses. The burden remains on the prosecution, however, to establish the absence of such mental disease or defect by proving the requisite *mens rea* beyond a reasonable doubt. Were a GBMI statute in effect, a jury would thus have to contend with legal insanity, mental illness (or retardation), negation of the intent element, shifting and varying burdens of proof, and guilt or innocence — all for the purpose of weighing a GBMI alternative which serves no valid function independent of the traditional guilty verdict. GBMI creates no intermediate degrees of culpability, it simply adds a "but mentally ill" to the guilty verdict. In short, the GBMI verdict provides no assistance to the jury in resolving the issues of insanity, mental illness and criminal accountability based on the trial evidence.

Some of these GBMI bills<sup>100</sup> appear to be based in large part on a similar Michigan law. The statute has been challenged in at least three cases brought in Michigan state courts, but none of those cases directly addresses the concerns we have expressed here. In *People v. McLeod*,<sup>101</sup> the defendant was found GBMI of arson. After the verdict, but prior to disposition, the trial court held hearings to determine what type of treatment might be provided to the defendant under the Michigan GBMI statute. At the close of the hearings, the trial court determined that the treatment mandated by the statute would not be provided to the defendant.<sup>102</sup> The Michigan Supreme Court reversed, finding that the determination was based on an inadequate record, and that the proceedings themselves were premature.<sup>103</sup> The defendant also challenged the probation provision of the statute, citing equal protection and due process violations in the mandate that the period of probation be not

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97. Mental illness is defined in New Jersey as "mental disease to such an extent that a person so afflicted requires care and treatment for his own welfare, or the welfare of others, or of the community." N.J. STAT. ANN. § 30:4-23 (West 1981). Mental retardation is defined as "a state of significant subnormal intellectual development with reduction of social competence . . . [which] is expected to be of life duration." *Id.*

98. An individual is legally insane "if at the time of such conduct he was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong." N.J. STAT. ANN. § 2C:4-1 (West 1982).

99. N.J. STAT. ANN. § 2C:4-2 (West 1982).

100. See *supra* note 81 and accompanying text.

101. 407 Mich. 632, 288 N.W.2d 909 (1980).

102. *Id.* at 648-49, 288 N.W.2d at 912-13.

103. *Id.* at 655, 288 N.W.2d at 915.

less than five years.<sup>104</sup> The court found that the statute permitted a sentencing judge to place a defendant on probation for less than five years and to provide for periodic review of the continuing need for treatment. It deemed the five year period "rebuttable."<sup>105</sup>

In *People v. Fultz*,<sup>106</sup> the defendant pleaded GBMI to joyriding. The psychiatric evidence showed him to have been legally insane at the time of the offense. The appeals court found the plea to be invalid because it was unsupported by an appropriate factual basis.<sup>107</sup> Consequently, the defendant's GBMI plea was vacated.

Finally, in *People v. Sorna*,<sup>108</sup> the defendant attacked the constitutionality of the statute. The appeals court disposed of the defendant's equal protection claim, finding no constitutional violation. The court regarded GBMI as "an intermediate category to deal with situations where a defendant's mental illness does not deprive him of substantial capacity sufficient to satisfy the insanity test but does warrant treatment in addition to incarceration."<sup>109</sup> The court stated further: "[t]he fact that these distinctions may not appear clear-cut does not warrant a finding of no rational basis to make them."<sup>110</sup>

As previously stated, none of these court challenges directly touches upon the substantial issues raised by the GBMI concept. Moreover, notwithstanding the *Sorna* opinion on equal protection, nothing prevents a federal court from finding such a violation in any one of the bills discussed here, under different circumstances.

It is important to note that a number of these GBMI bills are, in effect, abolition bills. They create the GBMI plea and verdict by amending Rule 12.2 of the Federal Rules of Criminal Procedure, eliminating all references in that Rule to procedures governing the insanity defense.<sup>111</sup> This tactic virtually repeals the insanity defense by a mechanism as direct as the one used in the abolition bills discussed earlier.

Finally, the GBMI concept gives merely the illusion of compassionate treatment. To the extent that it has been documented, people convicted under that verdict are sentenced in the same manner as defendants who are found guilty. Thus, the jury's verdict of GBMI does not always ensure treatment for the defendant.<sup>112</sup>

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104. *Id.* at 655-56, 288 N.W.2d at 915-16.

105. *Id.* at 664, 288 N.W.2d at 919.

106. 111 Mich. App. 587, 314 N.W.2d 702 (1981).

107. *Id.* at 591, 314 N.W.2d at 704.

108. 88 Mich. App. 351, 276 N.W.2d 892 (1979).

109. *Id.* at 360, 276 N.W.2d at 896.

110. *Id.* See also *People v. Jackson*, 80 Mich. App. 244, 263 N.W.2d 44 (1977) (per curiam).

111. See, e.g., S. 1106, 97th Cong., 1st Sess. (1981); H.R. 6949, H.R. 6726, H.R. 6716, H.R. 6709, and H.R. 5395, 97th Cong., 2d Sess. (1982).

112. See Lauter, *New Verdict: Guilty But Mentally Ill: The Legislative Alternative*, Nat'l L.J., May 3, 1982, at 12, col. 3. The American Bar Association has passed preliminary judgment on the GBMI verdict and has deemed it "misleading

### C. Disposition Bills

An area which was specifically addressed by one New Jersey bill,<sup>113</sup> and which permeated several of the federal bills, was that of the post-verdict disposition of defendant found NGRI, or—in the case of the federal legislation—GBMI.<sup>114</sup>

The New Jersey bill proposed to amend pertinent sections of the state's criminal code<sup>115</sup> to provide that NGRI committees be committed for treatment for a period of time at least equal to the minimum criminal sentence which could have been imposed had the defendant been found guilty of the offense charged.<sup>116</sup> A mandatory minimum period of commitment for treatment would thus be established, based solely on the minimum criminal sentence for the underlying charge. This proposal gave rise to substantial problems.

Perhaps the most significant problem is that no comparable fixed minimum term of commitment exists for individuals who are civilly committed in New Jersey.<sup>117</sup> Thus, the bill would be in violation of constitutional guarantees of due process and equal protection afforded to individuals subject to involuntary confinement, as established by the Supreme Courts of New Jersey and of the United States.

In *State v. Krol*, the New Jersey Supreme Court spoke broadly of the constitutional requirement of substantially identical treatment for all individuals committed because of dangerousness resulting from mental illness—whether such individuals were originally confined through the civil commitment process or through the criminal courts.<sup>118</sup> This concept was confirmed and significantly expanded in *State v. Fields*, where the supreme court concluded:

[T]he fact that a mentally ill person has committed an act which would expose a mentally competent person to criminal sanction is a *constitutionally unacceptable* justification for granting him less procedural and substantive protection against involuntary commitment than that generally afforded all other members of society . . . [Krol] indicated that the same criteria should be dispositive of the propriety of modifying or terminating orders requiring institutionalization . . . at the request of the NGI committee or the State, as is the case where the release of civil committees is at issue.<sup>119</sup>

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and ill-conceived." Task Force on Nonresponsibility for Crime, ABA, *Provisional Criminal Justice Mental Health Standards*, pt. IV, at 9 (Apr. 1982) (discussion paper: not to be construed as the final official position of the ABA).

113. See N.J. Senate Bill 1427 (1982), which was also defeated in the New Jersey Senate Judiciary Committee on August 5, 1982.

114. See, e.g., S. 1106, 97th Cong., 1st Sess. (1981); H.R. 6742, H.R. 6726, H.R. 5395, 97th Cong., 2d Sess. (1982).

115. See N.J. STAT. ANN. §§ 2C:4-8, 2C:4-9 (1982).

116. N.J. Senate Bill 1427, § 1 (1982).

117. See N.J. CT. R. 4:74-7.

118. 68 N.J. 236, 250-51, 344 A.2d 289, 297 (1975).

119. 77 N.J. 282, 294, 390 A.2d 574, 580 (1978) (emphasis added).

The court concluded, as a matter of constitutional imperative, that "the significant safeguards afforded civil committees by virtue of the [requirement of] periodic review . . . must be extended to NGI committees as well."<sup>120</sup> The New Jersey bill thus violated the constitutional mandate of *Fields* by imposing a minimum term of confinement and by setting that minimum term of confinement as a prerequisite to release under the provisions of state law.<sup>121</sup>

The bill's provisions also ran afoul of similar constitutional imperatives articulated by the United States Supreme Court: "At the least, due process requires that the nature and duration of the commitment bear a reasonable relation to the purpose for which the individual is committed."<sup>122</sup> In *O'Connor v. Donaldson*,<sup>123</sup> the Supreme Court was even more emphatic: "Nor is it enough that [the individual's] original confinement was founded upon constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed."<sup>124</sup>

In sum, New Jersey constitutional law requires identical treatment for NGRI committees and civil committees. This treatment includes equal rights to periodic review as provided by the New Jersey Court Rules.<sup>125</sup> In each review hearing the State must prove, by a preponderance of the evidence, the continuing need for confinement of the individual due to his current mental illness and resulting likelihood of dangerousness.<sup>126</sup> Insofar as the New Jersey bill purported to establish a fixed minimum term of confinement, it was thus incompatible with the flexibility and individual consideration constitutionally required by the State in matters relating to confinement of NGRI defendants.<sup>127</sup>

The federal disposition bills raise similar concerns. Some provisions give the director of the facility to which the individual is committed sole discretion to determine when that individual has recovered "to such an extent that he is no longer in need of custody, care or treatment in a mental hospital. . . ."<sup>128</sup>

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120. *Id.*

121. See N.J. STAT. ANN. § 2C:4-9 (West 1982).

122. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

123. 422 U.S. 563 (1975).

124. *Id.* at 574-75 (citing *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). In *Fields*, the New Jersey Supreme Court cited both *Jackson* and *O'Connor* as constitutional authority for its holding. See 77 N.J. at 294-97, 390 A.2d at 580-81. The nexus between state and federal constitutional principles in this area is thus extremely strong.

125. See N.J. Cr. R. 4:74-7(f).

126. See *supra* note 11 and accompanying text.

127. The authors' review of Public Defender files reveals that a defendant who is found NGRI after a trial is consistently found NGRI of the indictment itself. On the other hand, a defendant whose trial results in a guilty verdict stands a chance of being found guilty of only a *part* of the indictment or of a lesser included offense. Therefore, the thrust of the New Jersey bill is further convoluted by the inability to determine with any certainty the charges of which an NGRI defendant would otherwise have been found guilty.

128. H.R. 6742, 97th Cong., 2d Sess. § 4243(e) (1982).

If the director made such a determination, he would file a certificate with the clerk of the committing court, which would trigger a hearing. There is no provision in these bills for periodic judicial review of the current mental status and dangerousness of the committed individual, such as occurs in New Jersey pursuant to *Krol* and *Fields*. Yet requiring such procedures for NGRI defendants is critical if the federal government is to offer a viable system of providing treatment for those who require it, while simultaneously protecting society from those who pose a true danger to themselves or others. By establishing a unified system for disposition of federal insanity acquittees, Congress can seize the opportunity to remedy some serious constitutional flaws in the existing system.<sup>129</sup>

At present, there is no uniform system through which the federal government can insure that persons found NGRI receive adequate treatment, nor can it insure that they are subject to restraints only when such restraints are necessary to protect society. With the exception of the District of Columbia,<sup>130</sup> persons acquitted by reason of insanity in a federal court are released from federal custody.<sup>131</sup> Civil commitment results only through essentially informal arrangements between the federal courts or the United States Attorney and state authorities.<sup>132</sup> Under this system, federal authorities retain no control over the acquittee's release or his treatment. There is an extensive history of judicial displeasure with this "undesirable gap in federal law,"<sup>133</sup> as well as a record of legislative proposals which have failed to be enacted into law.<sup>134</sup>

The federal disposition bills at least raise the possibility that this gap can

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129. These flaws are currently being challenged in the federal appellate courts. See, e.g., *Jones v. United States*, 432 A.2d 364 (D.C. Ct. App. 1981) (*en banc*, cert. granted, 454 U.S. 1411 (1982)). The Division of Mental Health Advocacy has argued that there should be no indefinite commitment of insanity acquittees; that the burden of proof for commitment should be borne by the prosecuting authority; and that there is no justification for any presumption of continuing insanity.

130. See 24 U.S.C. § 211 (1976) (requiring federal court finding a criminal defendant to be insane to certify same to the Secretary of Health and Human Services who may then order psychiatric commitment).

131. The courts of appeals in several circuits have examined 24 U.S.C. § 211 (1976), to determine whether or not its provisions for civil commitment apply outside the District of Columbia. With the possible exception of the Sixth Circuit, none have concluded that the statute providing for commitment to St. Elizabeth's Hospital applies to persons acquitted outside the District. See *infra* note 133.

132. See, e.g., VA. CODE § 37.1-95 (1950 & Supp. 1981).

133. 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 512, at 368 (2d ed. 1982). See, e.g., *United States v. McCracken*, 488 F.2d 406, 416 n.14 (5th Cir. 1974); *Howard v. United States*, 229 F.2d 602, 608 (5th Cir.), *rev'd en banc*, 232 F.2d 274 (5th Cir. 1956). But see *Pollard v. United States*, 282 F.2d 450, 464 (6th Cir.), *reh'g. granted*, 285 F.2d 81 (6th Cir. 1960), the reasoning of which was rejected by the Eighth Circuit in *Pope v. United States*, 372 F.2d 710, 731 (8th Cir. 1967), *vacated*, 392 U.S. 651 (1968). See also *United States v. Greene*, 497 F.2d 1068 (7th Cir. 1974) (general weight of authority is that statute does not apply outside District).

134. S. 1437, 95th Cong., 1st Sess. (1977); S. 979, 91st Cong., 1st Sess. (1969);

be filled and a uniform system imposed. The concerns noted earlier, however, still remain. The New Jersey system has resulted in a workable balance of treatment and security. NGRI acquittees who are declared a danger to the community remain hospitalized or subject to judicial oversight, while those who are declared not dangerous may be released to appropriate civil treatment settings. The New Jersey courts have engaged in a process of "gradual de-escalation of restraints upon the [patient's] liberty,"<sup>135</sup> rather than a wholesale release of acquittees.

While periodic judicial review for NGRI acquittees is a hallmark of the New Jersey system, that concept is totally lacking in the federal disposition bills. The maximum length of confinement for such acquittees under the proposed federal system is "the maximum sentence for the charge regarding which a verdict of not guilty only by reason of insanity was returned."<sup>136</sup> Another disposition bill, introduced subsequent to congressional hearings on the package of bills previously discussed,<sup>137</sup> also fails to provide this mechanism.<sup>138</sup> Were the New Jersey approach to be adopted for federal NGRI acquittees, two important goals would be met: the provision of adequate treatment for such acquittees, and the provision of meaningful protection to society from the acquittee who, because of mental illness, is a danger to himself or to others.

*D. The Role of Expert Testimony on Questions of Responsibility and Dangerousness*<sup>139</sup>

The question of the proper role of expert testimony in judicial proceedings in which the insanity defense is raised was addressed in several federal bills.<sup>140</sup>

The ultimate question to be answered in a criminal trial where insanity is raised is whether or not the defendant should be held responsible for his act. It is not a question which can or should be answered by an expert witness. "Responsibility is a legal concept, to be decided by the jury in accordance with

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S. 2741, S. 2740, and S. 1007, 90th Cong., 1st Sess. (1967); S. 3753 and S. 3689, 89th Cong., 2d Sess. (1966).

135. *State v. Fields*, 77 N.J. at 303, 390 A.2d at 584 (emphasis added).

136. H.R. 6783, 97th Cong., 2d Sess. § 4175(a) (1982).

137. See *supra* notes 52, 78, 79, 81-83, 111, 114.

138. See H.R. 7259, 97th Cong., 2d Sess. (1982).

139. Subsequent to the hearings on September 9, 1982, before the Subcommittee on Criminal Justice of the House of Representatives Committee on the Judiciary, the Subcommittee requested the Department of the Public Advocate to submit additional testimony on the role of expert testimony in trials where the insanity defense is raised. This aspect of expert testimony had been addressed in various bills before the Subcommittee and was clearly regarded by the legislators as a separate area of particular concern. The discussion which follows herein reflects the views submitted by the Department of the Public Advocate. H.R. 7259, 97th Cong., 2d Sess. (1982), introduced subsequent to the September 9, 1982 hearings, reflects some of the Department's recommendations.

140. See, e.g., H.R. 7259, 97th Cong., 2d Sess. (1982).



the rules laid down by the court."<sup>141</sup> It is not for the expert witness to testify in conclusive terms as to whether the defendant "knew right from wrong" or "appreciated the wrongfulness of his conduct."<sup>142</sup>

Although Rule 704 of the Federal Rules of Evidence appears to adopt an expansive view of the proper scope of expert testimony,<sup>143</sup> that rule "does not lower the bars so as to admit all opinions."<sup>144</sup> Other rules "afford ample assurances against the admission of opinions which would merely tell the jury what result to reach . . . and stand ready to exclude opinions phrased in terms of inadequately explored legal criteria."<sup>145</sup> Thus, under Rule 704, "courts must remain vigilant against the admission of legal conclusions, and an expert witness may not substitute for the court in charging the jury regarding the applicable law."<sup>146</sup>

This analysis raises what is, in essence, the threshold question to be asked: has psychiatric expertise been sufficiently established to permit the general admission of opinion evidence in either insanity determinations or, as is especially relevant in post-acquittal commitment proceedings, in determinations of a person's dangerousness?

141. H. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 284 (1954). See also 2 A. GOLDSTEIN, *THE INSANITY DEFENSE* 97 (1967) ("There is widespread agreement that an expert witness may not be asked whether the defendant was 'responsible'"); G. MORRIS, *THE INSANITY DEFENSE: A BLUEPRINT FOR LEGISLATIVE REFORM* 53-54 (1975); H. UNDERHILL, *CRIMINAL EVIDENCE* § 463, at 1158 (5th ed. 1956).

142. *United States v. Brawner*, 471 F.2d 969, 1017-21 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part). See *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967) (overruled on other grounds by *Brawner*) ("[T]here is no justification for permitting psychiatrists to testify on the ultimate issue [of whether an accused's actions resulted from mental illness]." *Id.* at 456. Such a conclusion "is not merely a summary of the underlying medical, psychological and social facts [but it] is an opinion on whether or not the defendant should be found guilty." *Id.* at 455-56 n.31). See also *United States v. Brown*, 540 F.2d 1048, 1054 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977) ("[O]pinion evidence cannot usurp the functions of the jury. . . .").

143. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." FED. R. EVID. 704.

144. FED. R. EVID. 704, advisory committee note.

145. *Id.* referring to FED. R. EVID. 403, 701 & 702.

146. *United States v. Milton*, 555 F.2d 1198, 1203 (5th Cir. 1977). For a similar provision under New Jersey law, see N.J.R. EVID. 56(3) and comment 9. See also *State v. Cavallo*, 88 N.J. 508, 520, 443 A.2d 1020, 1026 (1982) ("The policy underlying Rule 56 is to exclude expert evidence when the danger it poses of prejudice, confusion and diversion of attention exceeds its helpfulness to the fact finder because the expertise is not sufficiently reliable."); *State v. Vigliano*, 50 N.J. 51, 72, 232 A.2d 129, 140 (1967) (opinion based on conjecture and speculation should be excluded as "invasion of the jury province"); C. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 12, at 26 (1954) (noting "the danger that the jury may forego independent analysis of the facts and bow too readily to the opinion of an expert or otherwise influential witness.").

As the opinion evidence doctrine has developed, "the opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of inquiry is such that inexperienced persons are unlikely to be capable of forming a correct judgment upon it, without such assistance,"<sup>147</sup> or where the witness has "peculiar knowledge or experience not common to the world."<sup>148</sup> An expert, however, "cannot give an opinion without considering all the data, facts and circumstances pertinent to the inquiry being made" and "cannot indulge in mere speculation and surmise."<sup>149</sup> The expert's function "is to give an opinion of fact . . . [which] either is material in terms of the applicable law or . . . is not."<sup>150</sup>

The interpretation of this doctrine in analogous areas such as lie detectors, voiceprints, and truth sera, reveals that in areas in which there is far greater reliability than in predictability of dangerousness, greater accord as to the witness' "peculiar skills" in forming opinions and far greater acceptance of techniques within the scientific community as to a test's accuracy, such testimony is, almost invariably, excluded.<sup>151</sup>

147. *Pincus v. Sublett*, 26 N.J. Super. 188, 192, 97 A.2d 712, 714 (App. Div. 1953).

148. *Rempfer v. Deerfield Packing Corp.*, 4 N.J. 135, 142, 72 A.2d 204, 207 (1950). Although New Jersey cases are predominantly referred to in this section, that State's courts reflect the vast majority of American jurisdictions. See generally 7 J. WIGMORE, EVIDENCE §§ 1917-1929, at 1-43 (1978).

149. *Rempfer*, 4 N.J. at 144-45, 72 A.2d at 208.

150. *State v. Kelly*, 118 N.J. Super. 38, 54, 285 A.2d 571, 580 (App. Div. 1972).

151. Testimony relating to polygraph testing is generally rejected because of "the lack of scientific acceptance [of the test] as a reliable and accurate means of ascertaining truth or deception." *State v. Clark*, 128 N.J. Super. 120, 126, 319 A.2d 247, 250 (App. Div. 1974). This holding stems partly from a finding that "the techniques of the process enhance the possibility of error from interpretation." *State v. Walker*, 37 N.J. 208, 215, 181 A.2d 1, 5 (1962). Cf. *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981) (analysis of admissibility of hypnotically refreshed testimony).

Also, although polygraphs may be accurate in the range of 70-95%, the means by which the examiner acquaints himself with the subject matter may be a source of improper suggestion. As a result, unusual responsibility rests with the examiner, and courts are reluctant to factor this uncontrolled variable into the traditional trial process. Their response, so far, has been to hold that the results of such examinations are still inadmissible where an objection is raised by the opposing party. See *United States v. Wilson*, 361 F. Supp. 510, 514 (D. Md. 1973).

In summary, acceptance of polygraph testing is characterized as "in its infancy," and courts are still persuaded "to walk slowly and carefully in these early polygraph days and until more universal and reliable scientific acceptance has been achieved." *State v. Smith*, 142 N.J. Super. 575, 577, 579-80, 362 A.2d 578, 579, 581 (App. Div. 1976). See also *State v. Baskerville*, 73 N.J. 230, 236, 374 A.2d 441, 444 (1977). For a comparison of physical evidence testing and psychological evidence testing, see Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974):

The court gave five reasons for excluding lie detector results: a) the possibility that extraneous qualities or characteristics of the subject might yield erroneous results; b) tendency of judges and juries to treat lie detector evidence as conclusive; c) the lack of standardized testing procedures; d) the difficulty

Psychiatric predictions of dangerousness do not meet the test for admissibility for several reasons. First, there is no evidence that psychiatrists possess any "peculiar skill" in predicting dangerousness; to the contrary, many studies show a "false positive" rate of 60% to 70%.<sup>152</sup> At least one major study has concluded that judges "have a better prediction rate" than do psychiatrists.<sup>153</sup> There is thus no reasonable certainty that such diagnoses are accurate. Second, it has not been conclusively determined that psychiatric skill in predicting dangerousness is "not common to the world."<sup>154</sup> At least one commentator has maintained that psychiatrists are less accurate predictors of dangerousness than psychologists, social workers, or correctional officials.<sup>155</sup>

Furthermore, the type of psychiatric interview generally relied upon as a

of evaluating examiner opinions; and e) the nonacceptance of the technique by appropriate scientific bodies.

Each of these objections provides a cogent reason also to exclude psychiatric judgments: a) extraneous qualities of psychiatric patients—such as their socioeconomic class—may substantially influence psychiatric judgments; b) judges and juries usually defer to psychiatric judgments; c) psychiatric interview procedures are unstandardized; d) it is difficult for judges and juries to evaluate the validity of individual psychiatric judgments; and e) psychiatrists and behavioral scientists who have studied the reliability and validity of psychiatric judgments almost unanimously agree that such judgments are of low reliability and validity.

*Id.* at 737 (footnote omitted) (discussing, *inter alia*, *State v. Valdez*, 91 Ariz. 274, 282, 371 P.2d 894, 900 (1962)).

As to voiceprints, in light of the high margin of error, and because of the very nature of the test, it has been held that the "validity, reliability and veracity" of voiceprint identification has not been demonstrated. *See D'Arc v. D'Arc*, 157 N.J. Super. 553, 558-65, 385 A.2d 278, 281-84 (Ch. Div. 1978). Similarly, results of tests administered under truth sera have been inadmissible "until the use of the drug as a means of procuring the truth from people under its influence is accorded general scientific recognition." *State v. Sinnott*, 24 N.J. 408, 429, 132 A.2d 298, 310 (1957) (quoting *State v. Lindemuth*, 56 N.M. 257, 273-74, 243 P.2d 325, 336 (1952)). This holding was reaffirmed in *State v. Levitt*, 36 N.J. 266, 275, 176 A.2d 465, 470 (1961).

152. *See Ennis & Litwack*, *supra* note 151, at 714. *See also Cocozza & Steadman*, *Some Refinements in the Measurement and Prediction of Dangerous Behavior*, 131 AM. J. PSYCHIATRY 1021 (1974); Rubin, *Prediction of Dangerousness in Mentally Ill Criminals*, 27 ARCH. GEN. PSYCHIATRY 397-98 (1972).

153. Ennis & Litwack, *supra* note 151, at 717. *See also Usdin*, *Broad Aspects of Dangerousness*, in THE CLINICAL DANGEROUSNESS OF THE MENTALLY ILL 43 (1967) ("We can make an educated guess, but what right does society have to act upon a guess?"); Rapoport, Lassen & Gruenwald, *Evaluations and Follow-up of State Hospital Patients Who Had Sanity Hearings*, 118 AM. J. PSYCHIATRY 1079, 1083 (1962).

154. *Rempfer v. Deerfield Packing Corp.*, 4 N.J. 135, 142, 72 A.2d 204, 207 (1950). *See also A. Stone*, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 33 (1975) ("It may well be that in many . . . situations a lay person can predict dangerousness at least as well as a professional.").

155. *See Dershowitz*, *The Psychiatrist's Power in Civil Commitment*, 2 PSYCHOLOGY TODAY 47 (1969).

In perhaps the clearest judicial statement of this position, the New York Appellate

basis for commitment does not regularly consider "all the data, facts and circumstances pertinent to the inquiry being made."<sup>156</sup> For example, in the case of *In re R.B.*, the appellate court reversed a commitment order that had been entered following testimony given by a psychiatrist whose opinion had been based on "a single interview without any factual support founded in the past actions of the patient or in prior manifestations of her mental illness . . ."<sup>157</sup> There is a serious "possibility of error from interpretations,"<sup>158</sup> and there is often "improper suggestion" in the manner in which the examiner acquaints himself with the subject matter.<sup>159</sup>

Moreover, the scientific community has not demonstrated general acceptance or recognition of the accuracy of tests used to determine dangerousness.<sup>160</sup> Even the American Psychiatric Association has acknowledged that "[n]either psychiatrists nor anyone else has reliably demonstrated an ability to predict future violence or 'dangerousness.' Neither has any special psychiatric expertise in this area been established."<sup>161</sup> Evidence dealing with psychiatric predictability "in terms of experimental quantification and verifiability,"<sup>162</sup> is far

Division remanded an NGRI release hearing for the taking of additional testimony with the following observations:

Without disparaging or denigrating the profession of psychiatry, we suggest that the witnesses summoned to the new hearing should include hospital employees such as nurses, orderlies, housekeepers and others who have had daily or frequent contact with petitioner. They will be able to relate to the court petitioner's actions and reactions to the stresses and strains which are experienced in the usual happenings of each day . . . It is suggested that a display of ungovernable temper when one has been inconvenienced by a housekeeper having just washed the floor may be more revealing and indicative of future conduct than the impression one gives when he sits across the desk or lies on the couch of a psychiatrist.

Application of Miller, 46 A.D.2d 177, 182-83, 362 N.Y.S.2d 628, 633-34 (App. Div. 1974).

156. *Rempfer*, 4 N.J. at 144-45, 72 A.2d at 208 (all pertinent information must have been considered by psychiatrist if his opinion is to be admissible).

157. 158 N.J. Super. 542, 547, 386 A.2d 893, 896 (App. Div. 1978).

158. *State v. Walker*, 37 N.J. at 215, 181 A.2d at 5.

159. *United States v. Wilson*, 361 F. Supp. 510, 512 (D. Md. 1973). See generally Ordway, *Experiences in Evaluating Dangerousness in Private Practice and in a Court Clinic*, in *THE CLINICAL EVALUATION OF THE DANGEROUSNESS OF THE MENTALLY ILL* 35 (1967) (clinicians may be influenced to conclude that lower socio-economic class individuals are dangerous because such individuals are presumed to be impulsive and thus more prone to violence; "[i]t sometimes seems that criteria for reevaluating dangerousness vary even when used by the same clinicians when they work in different settings"); Ennis & Litwack, *supra* note 151, at 719-32; Dickes, Simons & Weisfogel, *Difficulties in Diagnosis Introduced by Unconscious Factors Present in the Interviews*, 44 *PSYCHIATRY* Q. 55 (1970) (unconscious conflicts of clinicians often cause distortions in perception and misapprehension of patient's true condition).

160. See *State v. Sinnott*, 24 N.J. 408, 429, 132 A.2d 298, 310 (1957).

161. American Psychiatric Ass'n, *Clinical Aspects of the Violent Individual* 28 (Task Force Report 8, 1974) [hereinafter cited as *Clinical Aspects*].

162. *United States v. Wilson*, 361 F. Supp. at 514.

closer to the nonphysical evidence of polygraphs, voiceprints, and the like, "and a good bit more conjectural"<sup>163</sup> than the physical evidence of ballistics or toxicology. The concerns of "mythic infallibility" expressed with regard to voiceprints<sup>164</sup> are equally pertinent here.

Finally, the reasons often given for rejecting polygraph testimony<sup>165</sup> are similarly applicable to psychiatric predictions of dangerousness. Especially troublesome is the deference which is shown by the court to psychiatric judgments. The few empirical studies which have been done have revealed uniformly that "the legal profession and the courts have surrendered a major segment of their role in decision making regarding involuntary hospitalization," and that there is "an unquestioned assumption of expert infallibility by the courts."<sup>166</sup> The historical existence of this "assumption of expert infallibility" demands far greater scrutiny than has ever been given this testimony. As the Supreme Court recently noted: "Indeed, some in the psychiatric community are of the view that clinical predictions as to whether a person would or would not commit violent acts in the future are 'fundamentally of very low reliability' and that psychiatrists possess no special qualifications for making such forecasts."<sup>167</sup>

Thus, psychiatric predictability of dangerousness meets none of the criteria for general admissibility of opinion testimony. Moreover, the issue of dangerousness is ultimately a legal question, not a medical one,<sup>168</sup> a concept recognized by the New Jersey Supreme Court in *State v. Krol*.<sup>169</sup> There the court stated that, while courts "should take full advantage of expert testimony presented by the State and by the defendant, the decision is not one that can be left wholly to the technical expertise of the psychiatrists and psychologists."<sup>170</sup> This principle was emphatically reaffirmed in *State v. Fields*.<sup>171</sup>

When read together, *Krol*, *Fields*, and their progeny<sup>172</sup> leave little doubt

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163. United States *ex rel.* Wax v. Pate, 298 F. Supp. 164, 167 (N.D. Ill. 1967).

164. See *D'Arc v. D'Arc*, 157 N.J. Super. 553, 385 A.2d 278 (Ch. Div. 1978); *supra* note 151.

165. See *supra* note 151.

166. Albers, Pasewark & Meyer, *Involuntary Hospitalization and Psychiatric Testimony: The Falibility of the Doctrine of Immaculate Perception*, 6 CAP. U.L. REV. 11, 31 (1976).

167. *Estelle v. Smith*, 451 U.S. 454, 472 (1981).

168. "'Dangerousness' is neither a psychiatric nor a medical diagnosis." Clinical Aspects, *supra* note 161, at 26. "It is not part of psychiatric training to evaluate dangerousness . . . [P]sychiatric testimony, to the extent that it overextends the reasonable boundaries of dangerousness, reflects an amalgam of ignorance, zeal, and self-protectiveness." Brooks, *Notes on Defining the Dangerousness of the Mentally Ill*, in DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 37, 41, 44 (1978).

169. See 68 N.J. 236, 261, 344 A.2d at 289, 302 (1975).

170. *Id.*

171. See 77 N.J. 282, 307-09, 390 A.2d at 574, 587-88 (1978).

172. For restatements of *Fields*, see *In re Newsome*, 176 N.J. Super. 511, 516-17, 424 A.2d 222, 224-25 (App. Div. 1980); *In re Scelfo*, 170 N.J. Super. 394, 397, 406

that the question is a legal one. Although psychiatric testimony may have evidential value, it cannot be considered dispositive.<sup>173</sup>

In sum, psychiatric predictability of dangerousness is considerably less trustworthy than other opinion evidence traditionally rejected by the courts. Groups such as the American Psychiatric Association agree with the courts that dangerousness is a legal issue. At most, some psychiatric opinions may be evidential, but they should not be seen as either controlling or conclusive.

### III. CONCLUSION

The legislation which has been suggested—by President Reagan and others—is based on the perpetuation of myths. It represents an unnecessary and extreme reaction to a group of serious misconceptions. The facts, as reflected by the New Jersey experience, disprove each and every one of the false premises in question. To abolish or eviscerate the defense in an attempt to respond to these misconceptions would be shortsighted, unnecessary and counterproductive. An examination of the evidence reflects no less.

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A.2d 973, 975 (App. Div. 1979) (applying *Addington v. Texas*, 441 U.S. 418, 433 (1979) (burden of proof), retroactively to NGRI committees). A portion of the language in question has since been cited with approval by the Third Circuit. *See Artway v. Pallone*, 672 F.2d 1168, 1175-76 n.9 (3d Cir. 1982).

173. *See J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* 219-21 (2d ed. 1975) (citing studies showing "no practical differences" in degree of accuracy of psychologists, psychological trainees and hospital secretaries in distinguishing brain-damaged psychiatric patients through the use of the Bender-Gestalt test).

## APPENDIX

TABLE I  
CURRENT CONFINEMENT STATUS BY TYPE OF OFFENSE

	A. MURDER	B. ASSAULT	C. ARSON	D. THEFT	E. OTHER
1. Presently in custody	28	13	4	4	1
2. Died	2				1
3. Released in the community with restrictions and court review	15	36	1	5	9
4. Released in the community and no longer reviewed	1	8	6	3	4
TOTAL	46	57	11	12	15

1. Confined to a public institution
2. A suicide and two natural deaths
3. Released to community care and regular review hearings before trial judge
4. Either released from review hearings by trial judge sixty days after *not guilty* by reason of insanity or conditions discontinued by trial judge at a subsequent *Krol* hearing
  - A. Indictments which were the result of a human death
  - B. Physical and sexual indictments
  - C. Arson indictments
  - D. Taking of property indictments
  - E. Offenses which do not fit in above categories

TABLE II  
DIAGNOSIS BY TYPE OF OFFENSE

	A. MURDER	B. ASSAULT	C. ARSON	D. THEFT	E. OTHER
Schizophrenia	38	46	8	10	13
Alcohol Psychosis	1	0	0	0	0
Organic Brain Syndrome	3	4	2	0	2
Paranoid	1	2	0	0	0
Mental Retardation	1	3	0	1	0
Acute Psychotic Depression	0	1	0	0	0
Antisocial Personality	0	0	1	0	0
Depressive Neurosis	0	0	1	0	0
Undetermined	1	1	0	1	0
TOTAL	45	57	12	12	15

TABLE III  
CONFINEMENT LENGTHS BY CRIME

	A. MURDER	B. ASSAULT	C. ARSON	D. THEFT	E. OTHER
Number Confined/Dead	30	13	4	4	2
Number Released	16	44	7	8	13
Mean Length of Confinement	56 months	34 months	10 months	37 months	32.5 months
Percent Still Confined	37.6%	22.8%	36.4%	33.3%	13.3%



TABLE IV

*PERCENTAGE BREAKDOWN OF CASES INVOLVING PSYCHIATRIC  
TESTIMONY FROM PUBLIC DEFENDER OFFICES, FISCAL YEAR 1982*

<u>RESULTS FROM SURVEY</u> <u>7/81 - 6/82</u>		<u>PERCENT OF 77</u> <u>SURVEY CASES</u>	<u>PERCENT OF</u> <u>32,549 P.D. CASES</u>
NGI	15	19%	.046
Guilty	22	30%	.068
Open Pending Competence	27	36%	.083
Dismissed	4	5%	.012
Not Guilty	1	1%	.001
Incompetent to Stand Trial (closed case)	8	9%	.025

TABLE V

*CATEGORIES OF PRIMARY CHARGES OF NGI CASES  
IN SURVEY, FISCAL YEAR 1982*

Of NGI Cases, Number Under Particular Charges

Murder	4
Assault	4
Arson	2
Theft	3
Other	2

*TABLE VI*  
*BREAKDOWN OF SENTENCES RESULTING FROM GUILTY*  
*VERDICTS IN SURVEY OF PSYCHIATRIC TESTIMONY,*  
*FISCAL YEAR 1982*

Of Guilty Cases, Number of Specific Sentences Per Charge

Murder (8)	
Custodial (ordinary terms)	4
Life imprisonment	1
Indeterminate	2
Not yet sentenced	1
Assault (6)	
Custodial (ordinary terms)	5
Indeterminate	1
Arson (0)	
Theft (6)	
Custodial (ordinary terms)	3
Referred to private attorney	1
Custodial (extended terms)	1
Not yet sentenced	1
Other (2)	
Custodial	2

TABLE VII

*SPECIFIC SENTENCE RESULTS FOR GUILTY VERDICTS IN  
PSYCHIATRIC TESTIMONY SURVEY, FISCAL YEAR 1982*

<u>Primary Charge</u>	<u>Sentence</u>
Murder (8 cases)	5 yrs. 0-8 yrs. 20 yrs. 25 yrs. 30 yrs. Life + 40 yrs. 125 yrs. Not yet sentenced
Assault (6 cases)	0-7 yrs., 0-15 yrs., 15 yrs. 5 yrs. 10 yrs. 10 yrs. 10 yrs. Unavailable*
Theft (6 cases)	3 yrs. probation 10-15 yrs., 3-5 yrs., 2-3 yrs., 3-5 yrs. 15 yrs. 19-38 yrs. Unavailable* Unavailable*
Other (2 cases)	
Fraud	18 mos. suspended, 3 yrs. probation
Unlawful Possession of a Weapon	5 yrs., 9 mos.

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\* "Unavailable" denotes cases where the exact sentences could not be obtained from records.